The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT REVERSES COURSE IN NEW OPINION IN *FRANK'S CASING*

Last Friday, the Texas Supreme Court issued its opinion on rehearing in *Excess Underwriters v. Frank's Casing*, __ S.W.3d __ (Tex. 2008). The Court withdrew its three-year old opinion that initially created a firestorm in the Texas insurance industry (and also lead to great consternation with commercial insureds) regarding the rights of reimbursement that a liability carrier possesses under Texas law when it pays a potentially non-covered claim. But, after keeping the industry waiting for more than two years for clarification since it granted the rehearing, last Friday a deeply divided Court reversed course by withdrawing and disregarding its earlier decision and refused to recognize an exception to the Texas rule that an insurer is only entitled to reimbursement for settling a claim against its insured if (1) the policy provides for it, or (2) the insured has given "clear and unequivocal consent to the settlement and the insurer's right's to reimbursement." After stating that liability insurers were better equipped to "carry the risk" associated with a coverage dispute, the majority suggested that insurers facing settlement demands on disputed claims have several options: refuse to settle and pursue a declaratory judgment action, leverage a declaratory judgment action to settle the third-party lawsuit, or rewrite the policy to include reimbursement rights. Not one, but two dissenting opinions recognized the problems with the majority approach - the windfall to insureds for coverage that was not underwritten when the policy was issued, and the burden other insureds must carry in increased premium costs due to the insurers' increased risks of settling uncovered claims. The dissent by Justice Hecht correctly observed that liability carriers in Texas will now have little choice but to bring a DJ action *every time* a liability claim raises potential coverage issues. The majority decision and both dissenting opinions can be found here: Opinion, Dissent 1, Dissent 2

Editor's Note: Friday's decision in *Frank's Casing* is one of the most significant decisions issued by the Texas Supreme Court in recent years. It raises a host of new issues for liability carriers facing potential coverage problems on both defense and indemnity claims. A liability carrier's ability to wait until the underlying tort case gets closer to trial before seeking to address and resolve the coverage issues seems to have been eliminated by last week's decision. The ironic aspect of the majority's decision (which was clearly intended to help commercial insureds in Texas) is that Friday's decision will hurt Texas insureds in the long run because they will be subject to *more litigation* rather than less. Friday's decision leaves Texas liability insurers with few options other than bringing DJ actions against their insureds every time an underlying tort suit raises coverage questions.

WACO COURT DETERMINES INJURED DALLAS COWBOY PLAYER ENTITLED TO WORKERS COMPENSATION BENEFITS IN ADDITION TO CONTRACTUAL SALARY AND MEDICAL BENEFITS

On Wednesday in *Gulf Ins. Co. v. Hennings*, 2008 WL 256828 (Tex. App.—Waco 2008), a two-judge panel of the Waco Court of Appeals decided former Dallas Cowboy football player Chad Hennings could recover workers compensation benefits in addition to his contractual salary and medical benefits, releasing yet another opinion displaying the internal disputes disrupting the court. Hennings was injured while playing for the Cowboys and received his salary and medical benefits through the end of his contract. When doctors declared Hennings recovered but recommended that he not continue playing football because of the danger of further injury, the Cowboys decided not to renew his contract and Hennings chose to retire instead of pursuing a spot with another team. In a case of first impression, the Waco Court determined that "[the workers compensation's statute] requires that the income and the medical benefits from employment must each be equal to or greater than the corresponding income benefits and medical benefits available under [the workers compensation statute]" to allow the highest level of total benefits. In this instance, Hennings' player salary exceeded workers compensation income benefits, but his medical benefits did not.

OWNERS/EMPLOYEES AVOID ERISA PREEMPTION BY PROVING HEALTH INSURANCE PURCHASED FOR MERE "BOOKKEEPING" PURPOSES COVERED ONLY OWNER/EMPLOYEES

In *Shearer v. Southwest Serv. Life Ins. Co.*, 2008 WL 256984 (5th Cir. 2008), a three-judge panel of the Fifth Circuit decided on Thursday that an owner/employee's claims against his health insurance company were not preempted by ERISA. The panel recognized that the facts presented to it in this case fell between two early decisions that had addressed situations involving "mere bookkeeping claims" where all employees had been covered (ERISA preempted) and the coverage purchased for a lone employee for tax benefits (not ERISA preempted). Because the facts of this appeal were presented as undisputed, the panel considered the matter under a *de novo* review as a question of law rather than the normal "clear error" standard. Looking at the evidence as a whole, the panel determined that Southwest failed to meet its burden to establish that the employer intended to establish or maintain an ERISA plan.